

EXECUTIVE CHAMBERS

HONOLULU

July 11, 2005

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 1843

Honorable Members
Twenty-Third Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith without my approval, Senate Bill No. 1843, entitled "A Bill for an Act Relating to Procurement."

The purpose of Senate Bill No. 1843 is to prohibit the inclusion of certain provisions from public works contracts with consultants who are licensed under chapter 464, Hawaii Revised Statutes. Specifically, this bill prohibits the inclusion of contract provisions that require professional construction design consultants to defend, indemnify, and hold harmless the government from liability arising from the negligence, errors, omissions, recklessness, or intentional misconduct of the government. The bill does allow public works contracts to require the professional construction design consultants to indemnify and hold harmless the government from liability arising from the negligence, errors, and omissions of the design professional.

Section 1 of the bill is objectionable because it states, "it is public policy for a governmental body to defend both parties [governmental body and professional construction design consultant] against any claims, with the extent of liability to be determined after settlement of the claim." This requirement in section 1 requires the governmental body to provide the legal defense for the professional construction design consultant when sued. Under section 1's requirement to defend the consultant, a lawsuit seeking damages from both the

State and the consultant would require the Attorney General to retain, at the State's expense, private legal counsel to defend the consultant to avoid a potential conflict of interest between the State and the consultant. Such representation in major liability cases could amount to hundreds of thousands of dollars of public funds.

Even though the principle embodied in section 1 is not affirmatively discussed in the remaining sections of the bill, should the intent as expressed by section 1 be utilized in construing the remainder of the bill, this could lead to results that are clearly not in the best interests of the State of Hawaii.

Moreover, subsection (a) of the new Hawaii Revised Statutes section in section 2 of the bill appears to state the unobjectionable principle that the State cannot require an individual to defend, indemnify, or hold harmless government from negligent acts, errors, omissions, recklessness, or intentional misconduct of the government. However, were this provision to be read in conjunction with section 1 of the bill to provide that there would be no duty to defend, indemnify, or hold harmless the government from any part of any claim for which the government was in any way at fault -- even the portion of the claim for which the construction design professional was at fault -- this type of provision would severely impede the ability of the State to appropriately protect itself.

It is not clear whether or not subsection (b) of the new Hawaii Revised Statutes section in section 2 of the bill is intended to specify the only circumstances under which the government may require a construction design professional to indemnify and hold harmless the government. It is, however, possible that a court could read this section as providing that only the statutory language could be utilized. Were that the

case, the language is not broad enough to protect the government. For example, in subsection (a), the language used is "the negligent acts, errors, or omissions, recklessness, or intentional misconduct." Subsection (b) of section 2, however, limits the government's right to be indemnified to "negligent acts, errors, or omissions, or intentional misconduct." It does not specifically include reckless or other wrongful acts. Thus, for this reason alone, this section is deficient.

Moreover, if this section is interpreted in accord with section 1, then the government might not even have the ability to assert an indemnity provision until the primary claim is concluded. This would clearly be contrary to public policy.

The practical concerns of design professionals with regard to obligations to defend the government are real and should be addressed through changes to the standard conditions of contracts and be reflected in conditions and general provisions for particular projects.

For the foregoing reasons, I am returning Senate Bill No. 1843 without my approval.

Respectfully,

LINDA LINGLE
Governor of Hawaii